UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GREGORY WALSH, Plaintiff,	:	3:03CV1609 (WWE)
v.	:	
WALGREEN EASTERN CO., INC., Defendant	:	

RULING ON DEFENDANT'S MOTION TO DISMISS COUNTS TWO AND THREE OF THE COMPLAINT

This is an employment action in five counts, brought by the plaintiff Gregory Walsh ("Walsh") against his former employer, Walgreen Eastern Co., Inc. ("Walgreen"), in the Superior Court for the Judicial District of Ansonia/Milford in the State of Connecticut. Walgreen removed the matter to this Court based on the allegation in count five of the complaint that Walgreen violated the Fair Labor Standards Act of 1938, codified at 29 U.S.C. §§ 302 et seq., which is a claim within this Court's original jurisdiction.

Pending before this Court is Walgreen's motion to dismiss count two of the complaint, in which Walsh alleges that he was forced to resign in violation of the public policy of the State of Connecticut as set forth in Chapter 557 of the Connecticut General Statutes; and count three of the

complaint, which alleges negligent infliction of emotional distress. Both are common law claims over which the Court is exercising supplementary jurisdiction pursuant to 28 U.S.C. § 1367. For the reasons set forth below, Walgreen's motion to dismiss counts two and three of the complaint will be granted.

Facts

The following facts are taken from the complaint and from the report of the parties' planning meeting. Walsh is a licensed pharmacist in the State of Connecticut. Walgreen is an out of state corporation doing business throughout the State of Connecticut. Walsh was employed by Walgreen as a pharmacist from March 1987 through February 2003. Walsh alleges he was employed under the terms of an implied contract which provided that Walsh would be paid a fixed hourly rate for regular time, and 150% of that rate for overtime, more commonly called "time and a half." Walsh asserts that he fully complied with all the terms and conditions of his implied contract of employment, but during the last 5 1/2 years of his employment with Walgreen, Walgreen breached the implied contract by refusing to pay Walsh for the overtime he worked, which Walsh claims totaled 123 hours over the 5 1/2 year period.

Because of this refusal by Walgreen to pay Walsh

overtime, Walsh alleges that Walgreen created a working environment so intolerable that Walsh was forced to resign involuntarily, which he asserts constituted a termination by Walgreen in violation of public policy. Walsh also claims economic loss; negligent infliction of emotional distress; violation of Connecticut's wage and hour laws; and a violation of the Fair Labor Practices Act of 1938.

Walgreen alleges that Walsh was a salaried employee who was paid all compensation that he earned and to which he was entitled, and that there was no employment contract between the parties relating to the payment of overtime. Walgreen also claims that Walsh did not suffer wrongful constructive discharge in violation of public policy because of the existence of adequate statutory remedies, and that Walsh failed to mitigate any of his alleged damages.

Discussion

Motion to dismiss

The function of a motion to dismiss is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). When deciding a motion to dismiss, the Court must accept as true

the well pleaded allegations of the complaint. Albright v. Oliver, 510 U.S. 266, 268 (1994). In addition, the allegations of the complaint should be construed favorably to the pleader. Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Count Two, Wrongful Termination in Violation of Public Policy.

Walsh alleges that by Walgreen's refusal to pay him the overtime pay he claims was due and owing him over a 5 1/2 year period, Walgreen created a working environment so intolerable that Walsh was forced to resign involuntarily, in violation of the public policy of the State of Connecticut. The Court construes this as an allegation of constructive discharge against Walgreen based on the public policy exception to the at will employment doctrine.

Walgreen asserts that it is well established law that the public-policy exception to the doctrine of at will employment is a narrow one. The Court concurs. Construing the allegations of the complaint favorably to Walsh, and accepting them as true, the Court is at a loss to understand why Walsh waited 5 1/2 years to take action on his overtime pay

concerns, instead of contacting the state and/or federal agency that regulates this issue. The non-payment of time and a half for overtime worked is not a common law public policy violation, but a matter that is strictly regulated by government agencies. Connecticut's wage and hour laws, codified at Connecticut General Statutes § 31-58 et seq., and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 302 et seq., would have provided Walsh with the remedy he sought if the overtime pay was justified. The Court does not find that the failure of Walgreen to pay Walsh time and a half pay for overtime worked reaches the level of a public policy issue.

Walsh argues that he has lost wages that he would have earned from Walgreen from the time of his termination until the time of his retirement or death, and that the termination of his employment inflicted a far greater injury on him than the mere failure to pay wages. He also argues that the only remedy for failure to pay wages is compensation at proper levels for the hours he worked in the past.

The Court finds that Walgreen did not, by failure to pay Walsh for 123 hours worked over a 5 1/2 year period that were allegedly overtime hours, create a working environment that was so intolerable that Walsh was forced to resign involuntarily. The Court also finds that the claims in counts

four and five will provide him with the remedy he seeks, i.e., compensation at proper levels for the hours he worked in the past, should he be successful on those claims.

Count Three, Negligent Infliction of Emotional Distress

A claim of negligent infliction of emotional distress as an independent tort is relatively new to Connecticut law. Historically, emotional distress was not compensated at common law in the absence of physical injury or a risk of harm from physical impact. It was not until 1978 that the Connecticut Supreme Court recognized the tort of negligent infliction of emotional distress. Montinieri v. S. New England Tel. Co., 175 Conn. 337, 345 (1978).

In count three, Walsh alleges a claim against Walgreen for negligent infliction of emotional distress. To prevail on a claim for negligent infliction of emotional distress in the employment context under Connecticut law, a plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that distress, if it were caused, might result in illness or bodily harm. Peralta v. Cendant Corp, 123 F.Supp.2d 65, 82 (D.Conn. 2000). Connecticut imposes additional requirements when the alleged infliction occurs in the workplace. "Negligent infliction of emotional distress in the employment

context arises only where it is based upon unreasonable conduct of the defendant in the termination process. The mere termination of employment, even where it is wrongful, is therefore not, by itself, enough to sustain a claim for negligent infliction of emotional distress. The mere act of firing an employee, even if wrongfully motivated, does not transgress the bounds of socially tolerable behavior." Whitaker v. Haynes Construction Co., Inc., 167 F.Supp.2d 251, 256 (D.Conn. 2001).

Because emotional distress in the workplace is not uncommon, courts have viewed the application of the negligent infliction of emotional distress claims with some alarm, and the Connecticut Supreme Court has stated that "courts should not lightly intervene to impair the exercise of management discretion or to foment unwarranted litigation." To that end, Connecticut courts have held that to be unreasonable, the employer's conduct must be humiliating, extreme, or outrageous. Miner v. Town of Cheshire, 126 F. Supp.2d 184, 197 (D.Conn. 2002).

In the present case, the defendant asserts that count three should be dismissed because the claim for negligent infliction of emotional distress was not based upon conduct in a termination process, citing the 1997 Connecticut Supreme

Court case of Parsons v. United Technologies Corp., 243 Conn. 66. However, since Parsons, the Second Circuit, in dictum, has expressed doubt as to whether the Connecticut Supreme Court would continue to limit the tort of negligent infliction of emotional distress to actions taken in the course of an employee's termination. The Second Circuit speculated that in light of 1993 amendments to the Workers' Compensation Act that excluded coverage for mental and emotional impairment, the Connecticut Supreme Court might permit a claim for negligent infliction of emotional distress in the absence of a termination. Based on the change in the Workers' Compensation laws, and the Second Circuit's shift in opinion, this Court will not dismiss Dixon's allegation of negligent infliction of emotional distress based on the defendants' assertion that the claim is not based upon conduct in a termination process.

However, the Court does find, based on the ample case law available, much of which was cited in Miner, that the threshold to prove negligent infliction of emotional distress is such that the employer's conduct must be unreasonable in the manner in which the employer carries out the employment action, and to be unreasonable, the conduct must be humiliating, extreme, or outrageous. This threshold is extremely high. As stated above, Connecticut courts have held

that even an employer's wrongful employment actions are not enough to sustain a claim for negligent infliction of emotional distress. The Court finds that Walsh's allegations do not rise to the required level of unreasonableness to state a claim for negligent infliction of emotional distress. Defendants' motion to dismiss count three will be granted.

Conclusion

For the reasons set forth above, Walgreen's motion to dismiss counts two and three of the complaint (Doc. # 12) is GRANTED.

SO ORDERED this 25th day of March, 2004, at Bridgeport, Connecticut.

_____/s/_____
WARREN W. EGINTON, Senior U.S. District Judge